# Chelingga ak Asuh @ Asu (f) v Wong Sew Yun & Ors

HIGH COURT (SIBU) — SUIT NO 22–3 OF 2004
HAMID SULTAN JC
30 JULY 2008

*Land Law — Indefeasibility of title and interests — Fraud — Whether land fraudulently transferred to first defendant — Whether plaintiff who was native illiterate could execute transfer without legal representation — Whether fraud had been proven beyond reasonable doubt — Whether second to fifth defendants as bona fide purchasers for value acquired indefeasible title*

*Native Law and Custom — Land dispute — Native title — Transfer of land — Whether transfer of native customary land to non-native was illegal and/or unlawful under Sarawak Land Code — Whether land could be classified as mixed zone land — Whether defence of limitation applies*

The plaintiff, an illiterate Iban lady, was the registered owner of a lot of land in the Sarikei Land District ('the land'), which she inherited from her late father. On 7 August 1988, when the plaintiff borrowed RM1,500 from the first defendant ('the loan') she gave the title of the land as a pledge to the first defendant. On 10 June 1989, by a memorandum of transfer instrument purportedly signed and executed by the plaintiff the land was transferred to the first defendant. The plaintiff claimed that she had neither consented to the said transfer nor executed any memorandum of transfer to transfer the land. As such the plaintiff alleged that the said transfer was effected illegally, unlawfully and fraudulently. The plaintiff further claimed that since the land was native customary land ('NCL') the transfer of the land to the first defendant, a non-native, was illegal and/or unlawful under the Sarawak Land Code ('the Code'). Sometime in November 1992, the first defendant transferred the land to the second, third, fourth and fifth defendants for a consideration of RM10,000. In her claim against all the transferees the plaintiff was primarily seeking an order that the land that was fraudulently and/or illegally transferred onto the first defendant and thereafter transferred by the first defendant to the second to the fifth defendants be ordered to be reverted back to her. It was the plaintiff's contention that since the transfer to the first defendant was void under s 8 of the Code, the subsequent transfer of the land to the second, third, fourth and fifth defendants was also void because the first defendant had no title or right in the land to transfer the land to the other four defendants. The defendants in their defence pleaded that the

land was in fact classified as mixed zone land and therefore capable of being transferred to non-natives. In addition the defendants raised the defence of limitation under s 3 of the Limitation Ordinance and claimed that the plaintiff's claim was time-barred. The second to fifth defendants also pleaded that the plaintiff had failed to prove beyond a reasonable doubt that the second to fifth defendants had conspired with the first defendant in the alleged fraud, if any, and that as such they were bona fide purchasers for value and upon registration they had indefeasibility of title, within the meaning of s 132(1) of the Code. The two main issues to be considered in this claim were whether the land was fraudulently transferred to the first defendant and whether the transfer of the land from the plaintiff to the first defendant and thereafter from the first defendant to the second to fifth defendants under the Code was illegal or unlawful and therefore null and void.

**Held**, allowing the plaintiff's claim partly with costs:

(1) The land was NCL because the father of the plaintiff was a native and a grant in perpetuity of the land free of premium rent and other charges were granted. This is an exclusive privilege under the Code and as clearly provided in s 8 of the Code, non-natives cannot and/or are restricted from enjoying any of the privileges or benefits of the native. In the circumstances, the defendant's proposition that the land was mixed zone land and that the transfer was therefore valid could not be supported by the evidence adduced by the defendants or according to the law (see paras 7–8).

(2) Even if the defendants had established according to the law that the land was mixed zone land it still remained that the transfer in the first instance was fraudulent. In this respect, although evidence was adduced by the first defendant to establish that the transfer was executed before an advocate and solicitor, on the facts of this case there was a greater obligation on the attesting solicitor to ensure that the plaintiff was properly represented by solicitors. The issue of legal representation was especially important in this case where the plaintiff was a native illiterate (see para 8).

(3) It is agreed that fraud must be proved beyond reasonable and not on a balance of probability. However, on the facts of this case it was clear that any prudent man would say that the transaction was fraudulent. In the circumstances the plaintiff had established in law that its agreement with the first defendant was a fraudulent transaction (see para 8).

(4) Although the defendants set up limitation as a defence it was never established when time was supposed to accrue against the plaintiff. The plaintiff in this case had only learned about the transfer of the land in

1998 or thereafter and the defence had not materially challenged this part of the defence with cogent evidence. Therefore the defence of limitation could not be upheld (see paras 7–8).

**[Bahasa Malaysia summary**

Plaintif seorang perempuan Iban yang buta huruf adalah pemilik berdaftar lot tanah di dalam Wilayah Tanah Sarikei ('tanah tersebut'), yang diwarisinya daripada arwah ayahnya. Pada 7 Ogos 1988, apabila plaintif meminjam RM1,500 daripada defendan pertama ('pinjaman tersebut') dia memberikan hakmilik tanah tersebut sebagai cagaran kepada defendan pertama. Pada 10 Jun 1989, melalui instrumen memorandum pindah milik yang jelas di tandatangani dan disempurnakan oleh plaintif, tanah tersebut telah dipindah milik kepada defendan pertama. Plaintif mendakwa bahawa dia tidak menyetujui pindah milik tersebut mahupun menyempurnakan apa-apa memorandum pindah milik untuk memindah milik tanah tersebut. Oleh itu plaintif mendakwa bahawa pindah milik tersebut dilaksanakan secara salah di sisi undang-undang, tidak sah dan secara menipu. Plaintif seterusnya mendakwa memandangkan tanah tersebut adalah tanah adat anak negeri ('TAAN') pindah milik tanah tersebut kepada defendan pertama, seorang yang bukan anak negeri adalah salah di sisi undang-undang dan/atau tidak sah di bawah Kanun Tanah Sarawak ('Kanun tersebut'). Sekitar November 1992, defendan pertama memindah milik tanah tersebut kepada defendan-defendan kedua, ketiga, keempat dan kelima dengan balasan RM10,000. Dalam tuntutannya terhadap kesemua penerima pindahan plaintif secara asasnya ingin memohon satu perintah bahawa tanah yang dipindah milik secara penipuan dan/atau salah di sisi undang-undang kepada defendan pertama dan kemudiannya dipindah milik kepada defendan-defendan kedua hingga kelima diperintahkan dikembalikan kepadanya. Ianya adalah hujahan plaintif bahawa memandangkan pindah milik kepada defendan pertama adalah terbatal di bawah s 8 Kanun tersebut, pindah milik tanah tersebut seterusnya kepada defendan-defendan kedua, ketiga, keempat dan kelima adalah juga terbatal kerana defendan pertama tidak mempunyai hak milik atau hak ke atas tanah tersebut untuk memindah milik kepada keempat-empat defendan tersebut. Defendan-defendan dalam pembelaan mereka memplid bahawa tanah tersebut pada hakikatnya diklasifikasi sebagai zon tanah bercampur dan oleh itu mampu dipindah milik kepada bukan anak negeri. Selanjutnya defendan-defendan membangkitkan pembelaan had masa di bawah s 3 Ordinan Had Masa dan mendakwa tuntutan plaintif adalah dihadkan oleh masa. Defendan-defendan kedua hingga kelima juga memplid bahawa plaintif telah gagal membuktikan melampaui keraguan yang munasabah bahawa defendan-defendan kedua hingga kelima telah berpakat dengan defendan pertama dalam penipuan yang didakwa itu, jika terdapat, dan oleh itu mereka adalah pembeli bona fide

untuk nilai dan setelah mendaftar mereka mempunyai hak milik tidak boleh disangkal, dalam maksud s 132(1) Kanun tersebut. Dua isu utama yang harus dipertimbangkan dalam tuntutan ini adalah sama ada tanah tersebut dipindah milik secara penipuan kepada defendan pertama dan sama ada pindah milik tanah tersebut daripada plaintif kepada defendan pertama dan seterusnya daripada defendan pertama kepada defendan-defendan kedua hingga kelima di bawah Kanun tersebut adalah salah di sisi undang-undang atau tidak sah dan oleh itu adalah batal dan tidak sah.

**Diputuskan**, membenarkan sebahagian tuntutan plaintif dengan kos:

(1) Tanah tersebut adalah tanah adat anak negeri ('TAAN') kerana ayah plaintif adalah anak negeri dan satu geran kekal tanah tersebut percuma dari sewa premium dan caj-caj lain telah diberikan. Ini adalah keistimewaan eksklusif di bawah Kanun tersebut dan seperti yang jelas diperuntukkan di dalam s 8 Kanun tersebut, bukan anak negeri tidak boleh dan/atau adalah ditegah dari menikmati sebarang keistimewaan atau faedah anak negeri. Dalam keadaan ini, cadangan defendan bahawa tanah tersebut adalah tanah zon bercampur dan bahawa pindah milik itu adalah sah tidak boleh disokong oleh keterangan yang dikemukakan oleh defendan-defendan atau mengikut undang-undang (lihat perenggan 7–8).

(2) Walaupun defendan-defendan telah membuktikan mengikut undang-undang bahawa tanah tersebut adalah tanah zon bercampur ia masih kekal bahawa pindah milik tersebut pada asalnya adalah satu penipuan. Dalam hal ini, walaupun keterangan dikemukakan oleh defendan pertama untuk memastikan yang pindah milik tersebut adalah dilaksanakan di hadapan peguam bela dan peguam cara, berdasarkan fakta-fakta kes ini terdapat lebih tanggungjawab di pihak peguam pengakusaksian untuk memastikan plaintif adalah diwakili secara sempurna oleh peguam cara-peguam cara. Isu representasi undang-undang adalah secara khususnya penting dalam kes ini kerana plaintif adalah seorang anak negeri yang buta huruf (lihat perenggan 8).

(3) Ianya adalah dipersetujui bahawa penipuan mesti dibuktikan melampaui keraguan yang munasabah dan bukan berdasarkan imbangan kebarangkalian. Walau bagaimanapun, berdasarkan fakta-fakta kes ini ianya adalah jelas iaitu mana-mana orang yang berhemat akan mengatakan bahawa transaksi itu adalah satu penipuan. Dalam hal ini plaintif telah membuktikan dalam undang-undang bahawa persetujuannya dengan defendan pertama adalah satu transaksi penipuan (lihat perenggan 8).

(4) Walaupun plaintif menetapkan had masa sebagai pembelaan ia tidak pernah dibuktikan bila masa yang sepatutnya terakru terhadap plaintif. Plaintif dalam kes ini hanya mengetahui mengenai pindah milik tanah tersebut pada 1998 atau selepas itu dan pembelaan tidak secara material mencabar bahagian pembelaan ini dengan keterangan yang jelas. Oleh itu pembelaan berupa had masa tidak boleh dibenarkan (lihat perenggan 7–8).]

**Notes**

For cases on fraud, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2929–2960.

For cases on native title, see 10 *Mallal's Digest* (4th Ed, 20005 Reissue) paras 665–667.

**Cases referred to**

*Bolo v Kokland & Ors* R 57 1A 325; AIR 1930 PC 270 (refd)

*Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands and Surveys, Miri Division & Anor* [2005] 5 MLJ 305; [2005] 3 CLJ 697, CA (refd)

*Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379, SC (refd)

*Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769, HC (refd)

*Pawa ak Ajah v Chung Kok Chiang @ Chong Kok Kiong & Anor* [2002] 6 MLJ 236; [2002] 8 CLJ 751, HC (refd)

*Sat anak Akum & Anor v Randong ak Charareng* [1958] SCR 104, CA (refd)

*Sumbang anak Sekam v Engkarong anak Ajah* [1958] SCR 95, CA (refd)

*Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 697, CA (refd)

*Superintendent of Land & Surveys, Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)

*Tan Swee Lan v Engku Nik binti Engku Muda & Ors* [1973] 2 MLJ 187, FC (refd)

*Wee Yee Ying & Anor v Emin Sadi* [2005] 3 CLJ 747, HC (refd)

*Yong Yeu Sin v Liew Nyat Kui & Ors* [2003] 3 CLJ 269, HC (refd)

**Legislation referred to**

Contracts Act 1950 ss 2, 2(g), 24, 30
Evidence Act 1950 ss 3, 101(2), 114(g)
Federal Constitution art 13
Limitation Ordinance Sarawak ss 2, 3
Sarawak Land Code ss 2, 4(1), 4(4), 8, 8(b), 9, 18, 18(3), 41, 132(1)

*Baru Bian (Baru Bian & Co Advocates) for the plaintiff.*
*Michelle Lau (MPM Advocates) for the defendants.*

**Hamid Sultan JC:**

**[1]** This is my judgment in respect of the plaintiff's claim primarily seeking an order that the land fraudulently and/or illegally transferred on to the first defendant, and thereafter transferred by the first defendant to the second to fifth defendants be ordered to be reverted back to her. The action against the sixth defendant has been withdrawn.

**[2]** At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination.

The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

PRELIMINARIES

**[3]** This is a sad case of an Iban (native of Sarawak), illiterate lady who says that she took a small loan of RM1,500 and as a security, gave the title and has paid them. But, one day in 1998 or thereafter, she discovered that the said property has been fraudulently and/or illegally transferred. A quick perusal of the memorandum of transfer and evidence shows the purchase price was grossly under valued, the lady was not represented by solicitors and there is a restriction of transfer of land relating to native customary land. The statement of claim alleges fraud and in particular says the first defendant is a non-native, and the transfer approved by the sixth defendant was illegal and/or unlawful under the Sarawak Land Code (SLC) as the said land was a native customary land and was issued with a title under s 18 of the SLC.

The defence is a simple denial and did not address the issues raised by the plaintiff. However, the evidence led by the defence was lengthy and raised issues which were not pleaded, and the submissions were equally lengthy requiring the court to consider various issues which was not pleaded, though some of them are points of law, which as a general rule need not be pleaded but may have to be pleaded, if it is to stand as a statutory defence, exception etc. Based on the first hand impression on the pleadings, and the evidence

adduced, as the law stands in my view, the defence must fail. Further, the court is restricted to the issues and prayers as pleaded only.

BRIEF FACTS (THE PLAINTIFF'S VERSION)

**[4]** The plaintiff was at the material time the registered owner of Lot 1572 Block 201, Sarikei Land District, a lot which she inherited from her late father Asu ak Empran alias Asuh ak Emperan ('the said land'). On or about 7 August 1988, the plaintiff borrowed a sum of RM1,500 ('the said loan') from the first defendant and thereby gave the title of the said land to the first defendant as a pledge that the plaintiff will repay the said loan to the first defendant, with no intention to transfer the said land to the first defendant on any account, including failure to settle or repay the said loan. The plaintiff claims that the said loan agreement was invalid for uncertainty.

The plaintiff claims that by a memorandum of transfer instrument No L 1993 of 1989, the first defendant fraudulently transferred the said land to himself which was purportedly signed and executed by the plaintiff on the 10 June 1989 and was duly registered at Sarikei Land Registry on 22 July 1989. The plaintiff claims she did not sign the said transfer nor consented to it and as such the transfer was illegal, unlawful and fraudulently done. The particulars of the fraudulent acts are stated under para 4 of the plaintiff's statement of claim which are as follows: (i) That the plaintiff did not execute and/or thumb-print any memorandum of transfer to transfer the said land to the first defendant; (ii) That the first defendant fraudulently thumb-printed the memorandum of transfer instrument No 1993 of 1998; (iii) That the first defendant has no justification to transfer the said land to himself as the plaintiff at the material time was paying the purported said loan; (iv) That the first defendant had been cheating the plaintiff because the plaintiff had in fact been asked by the first defendant to pay for and settle the interests purportedly on the said loan as late as 8 December 1990, when in fact, the first defendant had already transferred and caused the said land to be registered in his name on the 22 July 1989; (v) That after July 1989, the first defendant had been charging interest on the said loan from the plaintiff where receipts were issued through two companies controlled and/or owned by the first defendant, namely Syarikat Rejang Pun (Evertrust Service Centre and Sarikei Credit & Leasing Sdn Bhd, which have the same address as No 24, 1st Floor, Repok Road, Sarikei, Sarawak, as that of the first defendant. The total sum paid as interest after July 1989 by the plaintiff was RM2,600; (vi) That the first defendant clearly cheated and/or defrauded the plaintiff to part and/or transfer the said land to the first defendant; (vii) Alternatively, that the first defendant even if he has the licence to lend monies (which is

denied) has no right under the law to charge such an exorbitant interest which is illegal.

Further, the plaintiff claims that the transfer of the said land to the first defendant a non-native, effected by the sixth defendant was illegal and/or unlawful under the Sarawak Land Code as the said land was a native customary land and was issued title under s 18 of the SLC.

On or about the November 1992, the first defendant transferred the said land to the second, third, fourth and fifth defendants purportedly for a consideration sum of RM10,000 vide Instrument No L 3129/92. This claim is admitted by the defendants under para 5 of their defence.

The plaintiff claims further that such transfer was illegal or invalid, null and void as all the transferees are non-native as the titles were issued under s 18 of the SLC being initially a native customary land.

Based on the above grounds and claims, the plaintiff therefore prays that the two transfers vide instrument No L 1993/1989 and No L 3129 of 1992 be declared illegal and invalid and that the registry book in the defendants' office be rectified accordingly. Further it is the plaintiff's prayer that a declaration be issued declaring that the said loan was illegal and unenforceable in law as the first defendant had no licence to lend monies.

The defences of the second, third, fourth and fifth defendants are as follows:

(i) that the said land is classified as mixed zone land;

(ii) as against the second, third, fourth and fifth defendants they are bona fide purchasers (see para 8(a)): and

(iii) the plaintiff's action is statute barred (see para 8(b)).

DEFENDANTS' ARGUMENT

**[5]** In crux the defendants say s 3 of Limitation Ordinance Sarawak (CAP 49) will apply, and there was no fraud in this case, asserting that the transfer was legal. The defendants in part of the submission say as follows:

(a) The evidence of the first defendant (DW2), the fifth defendant (DW3), Wong Cheng Siong (DW4) and Chen Tai Huong (DW5) is that: (i) in 1992, the first defendant (DW2) approached a friend, Wong Cheng Siong (DW4), to see if he could find a buyer for the said land as he had bought it as an investment and had intended to sell it for a profit, (ii) DW4 found the second to fifth defendants who agreed to buy the said land for RM10,000 between them in ¼ share each, (iii) DW4 who had never met the plaintiff or heard or known of any of her allegations, did not have any further dealings in the matter when M/S Chen & Company Advocates in Sarikei were instructed to prepare the memorandum of transfer for the parties. He was very surprised to learn

of this suit against the first to fifth defendants as he is convinced that the transaction was bona fide and without notice of any of the plaintiff's allegations, (iv) the first defendant never met the second to fifth defendants at that time as he went to sign the memorandum of transfer (p 2 of exh 'Dl') at a different time from them and he collected the purchase price from M/S Chen & Company Advocates, (v) nobody informed the second to fifth defendants of the plaintiff's allegations before or at the time that they bought the said land. All that the fifth defendant knew was that M/S Chen & Company Advocates made a search of the said land before they bought it and the search showed that it was a clean title, so they bought it. They also have no knowledge of the plaintiff at all (vi) in February, 2004, the second to fifth defendants sold the said land to the said Nguong Aik (Sarawak) Sdn Bhd and the memorandum of transfer was again prepared by M/S Chen & Company Advocates (the memorandum of transfer is on pp 3–4 of exh 'Dl' and a print-out of the land title of the said land showing the said Nguong Aik (Sarawak) Sdn Bhd as the registered proprietor of the said land is on pp 8–9 of exh 'Dl'), (vii) about one or two months later, the second to fifth defendants were very surprised and shocked when the plaintiff served them this writ, about 12 years after they had bought the said land. They never had any notice whatsoever of any of the plaintiff's allegations, (viii) Chen Tai Huong (DW5), an advocate of the High Court in Sabah and Sarawak in active legal practice for 24 years and the proprietor of his own firm, M/S Chen & Company Advocates, Sarikei who is also a commissioner for oaths, was very surprised to learn of this suit against the second to fifth defendants as he is convinced that both the above transactions were bona fide and without notice of any of the plaintiff's allegations. He himself had never heard or known of any of the said allegations. He had made a land search before he prepared each memorandum of transfer and both times the searches showed that the land title was clean and the transactions could proceed.

(b) this court ought not to allow the plaintiff's claim against the second to fifth defendants as: (i) the plaintiff has absolutely failed to prove beyond reasonable doubt that the second to fifth defendants conspired or colluded with the first defendant in the alleged fraud or was a party or privy in any way to the alleged fraud; (ii) the second to fifth defendants had taken 12 years to sell the said land, thus showing that they were not in any hurry to sell it off in order to hide any alleged fraud on their part. During this time, the plaintiff had ample opportunity to lodge a caveat to protect her alleged rights but she failed to, thus the said Nguong Aik (Sarawak) Sdn Bhd bought the said land without any notice of her alleged rights; (iii) indeed, as the plaintiff has absolutely failed to prove beyond reasonable doubt that the transfer to the first defendant was tainted by fraud, it necessarily follows that he had good and valid title

to transfer to the second to fifth defendants; (iv) in any event, the second to fifth defendants are bona fide purchasers without notice of the plaintiff's claims and were under no duty to check into the validity of the first defendant's title and therefore upon registration, they have indefeasibility of title within the meaning of s 132(1) of the SLC; (v) furthermore, the plaintiff, by choosing not to cross-examine the fifth defendant (DW3), Wong Cheng Siong (DW4) and Chen Tai Huong (DW5), has absolutely not disputed their evidence nor challenged the qualifications or reputation of DW5.

THE PLAINTIFF'S ARGUMENT

**[6]** Learned counsel for the plaintiff says there are only two issues to be determined. They are as follows:

(a) whether the transfer from the plaintiff to the first defendant and thereafter from the first defendant to the second, third, fourth and fifth defendants under the Sarawak Land Code (Cap 81) was illegal or unlawful and therefore null and void.

(b) whether the said land was fraudulently transferred at the first instance.

**[7]** The plaintiff says:

(a) section 18 of the SLC states:

> 18(1)Where the Superintendent is satisfied that a native has occupied and used any area of unalienated State land in accordance with rights acquired by customary tenure amounting to ownership of the land for residential or agricultural purposes, he may, subject to s 18A, issue to the native a grant in perpetuity of the area of land free of premium rent and other charges.

(b) section 18A is not relevant in this case;

(c) the issuance of the title to the said land was clearly in accordance with s 18, ie; the restrictions and special conditions on the title were issued under s 18 and secondly it was for agricultural purposes. Thirdly, it was issued free of annual rent and in perpetuity. From the reading of the provisions of the SLC, native customary land exists under two categories, the first where title is not yet issued but the said land was occupied before first January 1958 (as envisaged under the definition of 'native customary land' under s 2 of the SLC) and the second, when title was issued under s 18 of the SLC as in this case. One need to deal with the issue of whether NCR over NCL is recognised or not as this had already been decided in two land mark cases; *Nor Anak Nyawai &*

*Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769, *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 697 (refd) and *Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands & Surveys Miri Division & Anor* [2005] 5 MLJ 305; [2005] 3 CLJ 697, which was approved on appeal by the Federal Court [2007] 6 CLJ 509;

(d) native customary rights (NCR) over NCL had always been protected under the adat or custom of the natives and laws of Sarawak. It has been decided that even the natives themselves were not permitted to sell, transfer or dispose off their temuda or farming rights over NCL to another native outside their family members and/or the community itself. This was held in *Sumbang anak Sekam v Engkarong anak Ajah* [1958] SCR 95 and *Sat anak Akum & Anor v Randong ak Charareng* [1958] SCR 104;

(e) in *Sumbang anak Sekam v Engkarong anak Ajah* [1958] SCR 95, it was held, inter alia, by the Native Court of Appeal of Sarawak that individual faring rights are not transferable by sale or other wise for value. The owner's next of kin must inherit such right otherwise it would revert to the headman of the community/village to take over the rights over the said land;

(f) in *Sat anak Akum & Anor v Randong ak Charareng* [1958] SCR 104, the Court of Appeal held that 'temuda' land (customary tenure) cannot be disposed off so long as there are heirs entitled to exercise farming rights over that land. Their Lordships said:

> It appears to me that there is in effect a form of entail on temuda land and as long as there are heirs entitled to exercise the farming rights over that land a testator cannot by will, or indeed by any other form of disposition, transfer those rights to anyone else. This seems to me to be only right when one considers the communal nature of Dayak farming and that the part played by the family unit of the bilek or door.

(g) the SLC expressly provided for the protection of NCR over NCL The case of *Sat anak Akum & Anor v Randong ak Charareng* [1958] SCR 104, demonstrates in a land considered 'pesaka' meaning inherited land, the old s 41 of the SLC makes it clear that 'pesaka' land cannot be transferred to any person without the leave of the resident. The said s 41 had since been deleted.

(h) the above was and is the position between native and a non-native person. What is the legal position between a native and a non-native

person as in our case? There is a total prohibition under s 8 of the SLC, which states:

> 8 Save as provided in s 9 —
>
> (a) person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, native customary land or Interior Area Land;
>
> (b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege shall be deemed to have been entered into for an illegal consideration; and in but without prejudice to para (d), any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished.

(i) in *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379, this section was examined by the Supreme Court. In this case the respondent was registered as the proprietor of land classified as native area land. He executed two documents (a) an agreement and (b) a declaration of trust. In the latter document he declared that he held the land in trust for the appellant. No authorisation of the Yang di-Pertua Negeri had been obtained. A caveat was lodged by the appellant in respect of the said land and this was duly registered. The respondent applied for an order to remove the caveat. The High Court allowed the application and awarded costs to the respondent. The appellant appealed. Their Lordships said at p 380 of the report:

> In our opinion, having regard to the provisions of s 9 of the Code, the prohibition contained in s 8 does not appear to be an absolute one but only a qualified prohibition and it seems to us that any dealing of native area land by a native of Sarawak with a non-native may be allowed if it is specifically authorised by the Yang di-Pertua Negeri in Council for the purpose. Since no authorisation has been produced by the appellant we will assume that none was given by the Yang di-Pertua Negeri in Council.

(j) in that case, the appellant was deemed a non-native and as a result, the court ruled that the agreement made between the respondent and the appellant was an agreement made in contravention of s 8(b) of the SLC. As such it was entered for an illegal consideration and was therefore a void agreement within the meaning of s 2(g) of the Contracts Act 1950.

(k) in *Pawa ak Ajah v Chung Kok Chiang @ Chong Kok Kiong & Anor* [2002] 6 MLJ 236; [2002] 8 CLJ 751, Nyalau anak Bunya ('Nyanau')

was the registered proprietor of a piece of land classified as native area land in Kanowit, Sarawak ('the land'). In 1991, Nyanau created a power of attorney in respect of the land in favour of the first defendant, a non-native, authorising the latter to deal with the land. Thereafter, the first defendant sold the land to the second defendant and executed a memorandum of transfer in respect thereof. Following Nyanau's death in 1998, the plaintiff, the widow and administratrix of Nyanau's estate, applied for declarations that the power of attorney and the unregistered memorandum of transfer were null and void, having contravened s 8 of the Sarawak Land Code as well as ss 2 and 24 of the Contracts Act 1950. The court agreed that the facts of this case come under the prohibition of s 8 of the SLC. Amongst other things the court ruled:

(i) The SLC is a statute dealing with matters relating to the general public and that being so, it is presumed to use words in their popular sense. Consequently, the court would interpret the word 'acquire' in the context in which the word appears as meaning no more than to 'gain' or 'obtain' or 'exercise' rights and privileges over native area land.

(ii) As made clear by ss 8 and 9 of the SLC, the intention of the SLC is directed at prohibiting and preventing any person who is non-native of Sarawak from acquiring any rights or privileges over native area land, except in a very limited circumstances permitted therein. And to prevent evasion, any agreement that is entered into which would result in such rights and privileges being enjoyed by a non-native is deemed to have been entered into for illegal consideration as would expose the parties to penal sanctions. It is not the case of the defendant here that they had come within the limited exceptions mentioned in s 9 of the SLC.

(l) in this case, the land was transferred to the first defendant, a clear violation of s 8 of the SLC, and therefore entered for an illegal consideration and was therefore a void agreement within the meaning of s 2(g) of the Contracts Act 1950.

(m) the defendants in their defence pleaded that the said land is in fact a mixed zone land. But there is no such words or phrases, which indicate that the said land was and is a mixed zone land. Witnesses from the Land and Surveys Department, Sarikei, including Mohamad Razali bin Arshad the Superintendent of Land and Surveys, Sarikei, DW6 and Kong Tong Kiong the assistant registrar of Land and Surveys Department, Sarikei, DW8 agreed that no such words or phrases had encumbered the title of the said land in questioned. Such a defence was not proven at all at the trial.

(n) notwithstanding the absence of such words on the title of the said land, DW8 in his exh WSDW8(CE) Q1(b) referred to pp 8 and 9 of the defendants bundle of documents exh Dl to support their contention that the said land is a mixed zone land. But that document is not the title of the said land but merely a print out of title.

(o) then the defendants argued that since the area in which the said land is located had been gazetted as a mixed zone land in January 1949, the said land must be deemed a mixed zone land. The defendants in their defence, did not plead this argument. Nevertheless, there is nothing in the SLC that allows such deeming provision. The opposite is true. Section 4(1) of the SLC allows the Minister by order to declare and signify in a gazette any area of land to be mixed zone land. But if the area declared happens to consist of native customary land, such land shall be unaffected. Section 4(4) states:

> (4) Where the area in respect of which a declaration has been made under sub-s (1), (2) or (3) comprises native customary land, such land shall be unaffected by the declaration, but any part thereof which may subsequently cease for any reason to be native customary land shall —

(p) thus there is no automatic conversion. And this is very consistent with the underlying policy and/or the golden thread as it were that runs through the SLC and its predecessors in protecting NCR over NCL

(q) in *Sumbang anak Sekam v Engkarong anak Ajah* [1958] SCR 95, the land in dispute was an untitled NCL located within an area already gazetted as a mixed zone land, yet it was never affected by such gazetting. At p 98 of the report, the court concluded as thus:

> As we see it the root of these proceedings is the desire of the appellant not only to be declared the holder of the customary rights but also to obtain a mixed zone title to the land. In our opinion this court has no jurisdiction to say that any title should be issued. That is a matter for Land and Survey Department. We would make it abundantly clear that a holder of customary rights even although the land, as in this case, is situated within the boundary of a mixed zone area is in no position to insist on a title. It is a question of government policy and it may well be, for example, that in view of future agricultural development government might not in certain cases consider it desirable to issue titles to such land.
>
> ...
>
> Finally the court again wishes to emphasise that this case must not be treated as a precedent by any Dayak who applies for a title to his customary tenure land situated in a mixed zone area. If on grounds

of public policy such a title is refused this case must not be cited to support an argument of niki nibong niki pinang.

(r) related to this point, although not pleaded by the defendants, there appears to be an attempt at the end of the trial to prove that the said land had ceased to be subjected to s 18 provision by the cancellation of the restriction and special conditions therein, which was done at the time of registering the memorandum of transfer instrument No L 1993/1989 transferring the said land from the plaintiff to the first defendant. Under cross-examination, DW8 said that the said cancellation was made by one Ming Yee Ching, an assistant registrar of the Land and Surveys Department. This person Ming Yee Ching did not testify in court to confirm this. The fact that the court invoked s 114(g) of the Evidence Act 1950, in the absence of the said Ming Yee Ching to explain such fact must be taken as an adverse inference against the defendants.

(s) under cross-examination, DW8 did not answer who can cancel such restriction and special condition on the title of the said land but merely said that the department did such cancellation as a matter of practice. DW8 repeated three times the phrase 'as matter of practice' in his answer at Q4, Q7 and Q8 pursuant to under s 18(3). Upon further being cross-examined by counsel for the plaintiff, DW8 finally agreed to the suggestion that the cancellation of the restriction and special condition to the said land title 'as a matter of practice' was not supported by any provision of the SLC.

(t) Upon closer examination of s 18(3) of the SLC, nowhere is it stated in this subsection that such land once issued title under s 18 could be transferred to a non-native. What the said subsection appears to provide is, where the said land is transferred to some body outside the family of the original proprietor or there is a change in the use of the said land from residential or agricultural purposes to any other purpose, then the appropriate premium or rent can be charged. The word to 'a person' appearing therein cannot be a non-native as this section clearly provides for land acquired by customary tenure. Secondly, the provisions to protect NCR over NCL are clearly provided for in the said SLC. The purposive interpretation must therefore be invoked to interpret and understand this subsection.

(u) thirdly, even if this cancellation is permissible under s 18(3), the unilateral approach taken by the said assistant registrar to cancel the restriction and special condition to the said title was null and void for a breach of natural justice. DW8 in his answers to our preliminary cross-examination question confirmed that the plaintiff was never given any notice of such cancellation. This amounts to a depravity of proprietary right. Proprietary right is protected under art 13 of the

Federal Constitution falling under the Fundamental Liberty Chapter of the Constitution. It cannot be the intention of the legislature to allow such draconian provision which can deprive a native of her NCR over NCL without her being able to protest or consent to such change in the restriction and special condition of the title. This is why the same is referred to as 'restriction and special conditions' built in the title to ensure that the right therein is secured and protected.

(v) looking at the date of registration of the memorandum of transfer instrument No L 1993/1989, which effected the transfer of title in the said land from the plaintiff to the first defendant and the date of cancellation, it appears to have been done simultaneously on the 22 July 1989. This was confirmed by DW8. This shows the fraudulent action of the first defendant in the said transfer. Taking the argument further, even if the said cancellation was done to allow a non-native to acquire right over the said land, it is submitted that the registration of the memorandum of transfer was made earlier than the cancellation evidenced from the instrument nos themselves ie; the memorandum of transfer was registered as instrument No L 1993/1989 whereas the cancellation was L 1994/1989.

(w) in the circumstances, since the said transfer to the first defendant was void under s 8, the subsequent transfer to the second, third, fourth and fifth defendants are also void as the first defendant in the first place has no title or right in the said land to transfer to the second, third, fourth and fifth defendants. The bona fide principle cannot be invoked in this case because all the second, third, fourth and fifth defendants are non-native and as such it is a clear cut statutory prohibition which cannot permit them to remain as registered proprietors of the said land.

(x) the third defence raised by the defendants is the issue of limitation under the Limitation Ordinance (Cap 49) s 3. No specific item was referred to on which the defendants intend to rely on. It has been decided in the case of *Pawa ak Ajah v Chung Kok Chiang & Anor* [2002] 6 MLJ 236; [2002] 8 CLJ 751, that the time period for such a case falls under item 112 of the schedule which covers suits 'For possession of immovable property or any interest therein not hereby otherwise specially provided for which is 12 years'.

(y) but the question then is, when does time start to accrue against the plaintiff? In this instant case, there is no written agreement to refer to. The plaintiff claims that the agreement was oral and without certainty and by virtue of that void. She borrowed RM1,500 from the first defendant on or about 7 August 1988 where she pledged her said land title to the first defendant that she would pay back the loan. There was no mention of time as to how long she has to complete the payment. If this is the case, such agreement was void under s 30 of the Contracts

Act 1950, which states, 'Agreements, the meaning of which is not certain, or capable of being made certain, are void'. A

(z) the first defendant contention is that the said land was duly transferred to him by consent clearly vide the memorandum of transfer instrument No 1993/1989. That could be the case of the first defendant. But the plaintiff's contention is that she did not execute that transfer and that the purported thumb print was not hers. The evidence adduced by the plaintiff vide the earlier memorandum of transfer instrument No L 167/1988 appearing at page 1 of exh 'P1' where she effected the transfer of rights in the said land from her late father shows PW1 signed her name therein and did not thumb-print. If one has to examine PW1's signature in her witness statement, WSPW1, is her signature therein as her signature in the memorandum of transfer instrument No L 167/1988. The first defendant brought in the purported lawyer who witnessed the execution of the said transfer between the plaintiff and the first defendant, DW1, Teo Chong Lee. DW1 of course has to confirm that the plaintiff came to his office and executed the transfer in his presence. B C D

(aa) it is very doubtful that DW1's story could be true. This is because, firstly, his statement under para 7 of his WSDW1 cannot be correct. Any search made on the said title should be clear that this is a land issued under s 18 of the SLC and as a lawyer DW1 ought to know that it is therefore native customary land. If we are to accept the defendant's argument that the said title ceased to be subject to s 18 upon the transfer of the said land to the first defendant by virtue of the cancellation appearing on the title, which was done on 22 July 1989, the same date the MOT Instrument No L 1993/1989 was registered, DW1 legal search on the said title, which must have been done earlier than 22 July 1989, cannot be showing the fact that the said title has now ceased to be subject to s 18 or that it is not a native customary land. DW1 was not telling the truth. Secondly, the burden of proof lies with the first defendant in law to prove that the thumb print in MOT Instrument No L 1993/1989 was indeed the plaintiff's by calling an expert witness to examine the said thumb print, to conclusively prove that it was the plaintiff's, especially when the plaintiff denied it and that independent documentary proof shows the plaintiff never signed with thumb print. E F G H

(ab) section 101(2) of the Evidence Act 1950 states:

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. I

A Illustration (b) states:

> *A* desires a court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts and which *B* denies to be true. *A* must prove the existence of those
B facts.

(ac) The plaintiff did not execute the said MOT Instrument No L 1993/1989 by thumb printing the same. And as such she had no knowledge that her said land was transferred to the first defendant until sometime in November 2003, as stated by her under para 23 of her
C WSPW1. Upon such discovery, she made a police report on 24 November 2003. The report is shown at p 3 of exh 'P1'.

(ad) the time starts to run from November 2003 for the plaintiff to take action. This was the time when the first defendant finally showed the
D plaintiff the MOT that her land was transferred to the first defendant. It must be noted that PW1 was never cross-examined on this part of her testimony. This testimony of the plaintiff should be admitted as the truth.

E (ae) in land cases, it has been held that time runs from the date the plaintiff's right was infringed on or threatened to be infringed on by the defendant. This was said in *Tan Swee Lan v Engku Nik binti Engku Muda & Ors* [1973] 2 MLJ 187, which followed the Privy Council case of *Bolo v Kokland & Ors* R 57 1A 325; AIR 1930 PC 270.

F (af) since fraud had been claimed and that in all probability true, the time runs from the knowledge of the fraud, ie November 2003. This is stated under s 18 of the Sarawak Limitation Ordinance.

**[8]** I have heard the evidence, read the documents and submission of the
G parties in detail I take the view that the plaintiff's claim for the title to revert back must be allowed. My reasons are as follows:

(a) I agree with the submission of the plaintiff that the land in question is a native customary land and only because the father of the plaintiff was
H a native, a grant in perpetuity of the area of land free of premium rent and other charges were granted. It is an exclusive privilege under SLC. It is quiet clear from other provisions of the SLC that non-natives cannot and/or restricted from enjoying any privileges or benefit of the native. This is clearly stated in s 8 of the SLC. The said land will not
I have been issued to the father if he was not a native. I am not satisfied by the pleadings of the defendants and the evidence adduced to support the proposition that it is mixed zone land and therefore the transfer was

valid. I will say here that pleadings and evidence adduced on a fundamental point was not sufficient in law to find in favour of the defence.

(b) Even if I am wrong in respect of the above, and on the assumption that the defendants had established according to law it is a mixed zone and the transfer is valid, it is also my finding that the transfer in the first instance was fraudulent. In this case, I accept the evidence of the plaintiff. The evidence of DW1, of the advocate and solicitor only attempts to establish that it was executed before him. It does not over and above explain many things. Very importantly in this case, the person is a native illiterate, not legally represented, purchase price was grossly inadequate, on the facts there is a greater obligation of attesting solicitors to ensure that on such transaction the plaintiff must be properly represented by solicitors.

(c) I am mindful of the fact that learned counsel for the defendants say that the plaintiff had to prove fraud beyond reasonable doubt and not on a balance of probability, and rely on two cases namely:

(i) In *Yong Yeu Sin v Liew Nyat Kui & Ors* [2003] 3 CLJ 269 where the court stated:

> We agreed that fraud whether made in a civil or criminal proceeding must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93, *Saminathan v Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case.

(ii) In *Wee Yee Ying & Anor v Emin Sadi* [2005] 3 CLJ 747 the court held:

> … In our view, the Court of Appeal has obviously misdirected itself in rejecting the proposition of law applied in *Saminathan v Pappa*, supra, that the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt which has been consistently applied by the courts in Malaysia. We see no reason to disturb the trend …

In addition to the above, learned counsel also asserts as follows:

The court there also said that the decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241

where it was held that the standard of proof required to prove forgery in civil cases is one on a balance of probabilities was concerned with forgery and not with fraud. However, the present case is involved with both fraud and forgery as para 3 of the statement of claim is in these terms:

> 3. The said land was fraudulently transferred to the first defendant by virtue of a forged memorandum of transfer dated the 5 July 1991...
>
> So the forgery of the instrument must be proved on a balance of probabilities while the transfer alleged to be done fraudulently must be proved beyond reasonable doubt. The evidence adduced for the defence must be considered together with those of the plaintiffs.

The propositions stated in the above cases in respect of burden of proof are correct propositions of law. This proposition originates from s 3 and must be read with other section of the EA. I have dealt with this provision in detail in *Public Prosecutor v Mohd Aszzid Abdullah* High Court of Kuching, Criminal Appeal No 41–20 of 2006-II and that part of the judgment which is relevant is reproduced and reads as follows:

> The word 'proof' means anything, which serves to convince the mind about the truth or falsehood of a proposition. Under s 3 of the EA 1950 a fact is said to be proved when after considering the matters before it, the court either: (a) believes it to exist; or (b) considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does exist. The extent to which a particular piece of evidence aids to prove a fact in issue is called its probative force. It is necessary for the probative force to be sufficient to induce the court: (i) to believe in the existence of the fact; and/or (ii) to consider its existence so probable that a prudent man may act upon the supposition that it exists. The test whether a matter has been proved or not is objective in nature and the test is — would a prudent man, after considering the matters before him deem the fact in issue proved or disproved. The word 'disproved' is exactly the opposite of 'proved' and is defined again in s 3 of EA 1950 to emphasis its importance. A fact is said to be disproved when, after considering the matter before it, the court either: (a) believes that it does not exist; or (b) considers its non-existence so probable, that a prudent man ought under the circumstances of the particular case, to act upon the supposition

that it does not exist. The term 'not proved' is explained in s 3 of the EA 1950. A fact is said to be not proved when: (a) it is neither proved; (b) nor disproved ...

On the facts of the case, I take the view that any prudent man will say the transaction is fraudulent. It is my finding that the transaction was fraudulent and the plaintiff has established the same accordingly to law.

(d) On the issue of limitation, I tend to agree with the submission of the plaintiff. Further, in this case the plaintiff complains that she only came to know of the land transfer in 1998 or thereafter. The defence has not materially challenged this part of the evidence and/or rebut the same by any cogent evidence to demolish such a claim, taking into consideration limitation is a defence.

**[9]** For reasons stated above, I allow the plaintiff's claim partly with costs. The getting up fees shall not exceed RM50,000. If costs cannot be agreed, the plaintiff is at liberty to tax the costs. I hereby make the following orders:

(a) Prayer (i), (ii) allowed.

(b) The Registrar of Lands and Surveys Sarikei, Sarawak, to make the necessary amendment in the registry book to give effect to this judgment by putting the plaintiff's name as the owner of the said property.

(c) Costs as stated above.

I hereby order so.

*Plaintiff's claim allowed partly with costs.*

Reported by K Nesan